REMEDIES SYMPOSIUM

ON CRITICAL JUNCTURES, INTERCURRENCE, AND DYNAMIC POLITICAL ORDERS

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Over the past two decades, national and state governments have struggled to find suitable remedies for harms perpetrated *against* religious adherents and institutions, as well as harms perpetrated *by* religious adherents and institutions. At the core of these fights surrounding the Free Exercise and Establishment Clauses of the First Amendment of the Constitution, the national Religious Freedom Restoration Act (RFRA) and state RFRAs are legitimate questions about the status of religious rights in the twenty-first century, the limiting principles on religious rights, and the types of political frameworks available for balancing religious rights and other valued individual and collective rights.

To address these complex questions, judges and scholars should investigate several larger developments in American politics, most notably the dynamics that are reconstructing our nation's church-state order. A wise first step in this investigation would be to track the various judicial, legislative, and social movement actions of the past several decades that implicate and contest the myriad forms of religious authority, right, and privilege in the United States. This step promises to supply a useful lens for evaluating the diverse, interwoven, and confrontational harms, claims, and liberty interests within our church-state order, while also helping to make sense of the controversies that will likely surround religious rights statutes and court cases in the future.

This article represents an initial theoretical sketch of such an investigative step. Although introductory by nature, this piece promises to initiate a longer and richer empirical undertaking, one in which greater

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attention will be paid to the sociological detail and lived texture of these broad, developmental accounts.[1]

Relying on contemporary historical-institutionalist literature concerning processes of American political development, I argue that the nebulous status of religious rights is largely a recent phenomenon—the result of one coalition (centered around rights protections for the LGBTQ community) growing and making important strides at the same time that a separate "religious rights" coalition attempts to push beyond a disorienting critical juncture.

I. CRITICAL JUNCTURES

To understand the political challenges (and minefields of potential legal harms) surrounding religious rights in the twenty-first century, let's first begin in 1963. In that year, the U.S. Supreme Court ruled in *Sherbert v. Verner* that the state could not substantially burden Adell Sherbert's free exercise of religion unless it proved that there was a compelling interest justifying the burden and that the state was applying the least restrictive means in achieving its compelling interest.[2] The test developed in this case—the *Sherbert* test—stood for decades as the touchstone for cases pertaining to the constitutional right to the free exercise of religion. The *Sherbert* test aspired to find a balance between government interests and citizens' religious freedom. The history of the *Sherbert* test demonstrates how hard federal courts worked to apply the test evenhandedly, so that neither the state nor religious adherents were structurally disadvantaged by its application.[3]

However, nearly three decades later, the applicability and reach of *Sherbert* was drastically circumscribed. In *Employment Division, Department of Human Resources of Oregon v. Smith*, the Supreme Court constructed a separate test for adjudicating religious free exercise cases.[4] Instead of asking whether the Native American claimants in the case had

1. For instance, in the statutes and cases explored in this article, the number of parties expressing liberty interests, claiming to have been harmed, and/or expecting future harm are legion, including religious adherents, religious institutions, women, members of the LGBTQ community, non-religious citizens, and several states. Further research, on the basis of this article, plans to introduce the valuable and discrete offerings of these different political actors.

2. Sherbert v. Verner, 374 U.S. 398 (1963).

3. Amy Adamczyk, John Wybraniec, & Roger Finke, *Religious Regulation and the Court: Documenting the Effects of* Smith *and RFRA*, 46 J. OF CHURCH AND ST. 237-62 (2004); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008).

4. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

been burdened by the relevant Oregon state law, the Court deemed other queries to be more constitutionally germane. If a burden had existed, it would then need to be determined whether the state had a compelling interest justifying the burden and had employed narrowly tailored means in achieving its interest. For instance, is the state law neutral and generally applicable? If so, the Court reasoned, then it usually will pass constitutional muster.[5]

Smith showcased a critical juncture within the church-state order of the United States. As historical-institutional political scientists such as Giovanni Capoccia and R. Daniel Kelemen have argued, critical junctures are rare occurrences within political development. These large institutional disruptions produce several significant outcomes, namely:

> The range of plausible choices open to powerful political actors expands substantially and the consequences of their decisions for the outcome of interest are potentially much more momentous. Contingency, in other words, becomes paramount.[6]

The Supreme Court's actions in *Smith* surprised many legal observers because it profoundly changed the church-state order in the United States. Moments of abrasion and disagreement between religious entities and state entities have always pervaded American life, but the *Smith* decision was distinct. The ruling promulgated a foreign set of principles for negotiating instances of church-state conflict. *Smith*'s reinterpretation of the Free Exercise Clause represented a fundamental reworking of the constitutional standards, rights expectations, and claimant positions surrounding religious exercise. Whereas under the *Sherbert* test, the onus was on the state to explain and justify its acts once a burden on religious exercise was uncovered, the *Smith* test flipped the script. Under the new general applicability test, it was incumbent on religious adherents to demonstrate how a government act was biased or applied unequally to a particular religious exercise or exerciser. It was only when such a high threshold of bias and unequal treatment was found

5. *Id.* at 881 (arguing that only a unique, hybridized religious rights claim could bring the constitutional scope of a neutral and generally applicable law into question) ("The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they have involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections.").

6. Giovanni Capoccia and R. Daniel Kelemen, THE STUDY OF CRITICAL JUNCTURES: THEORY, NARRATIVE, AND COUNTERFACTUALS IN HISTORICAL INSTITUTIONALISM, 59 WORLD POLITICS 341, 343 (2007); *See also* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004).

that the *Sherbert* test would be triggered and investigation into the compelling interest of the state would commence.[7]

Incidentally, the critical juncture facing the church-state order in the United States also was visible in the increasingly unsettled area of Establishment Clause case law. What did and did not qualify as "respecting an establishment of religion" became an unnavigable morass. According to the U.S. Supreme Court, a standalone nativity scene in a county courthouse was unconstitutional, but a large menorah set next to a Christmas tree was constitutional.[8] A Christian group using public school property for proselytism, hymn singing, and religious events was acceptable, but a short, non-denominational benediction given at a public high school graduation was beyond the pale.[9] A student reading a prayer before a public high school football violated the Establishment Clause, but a chaplain opening municipal meetings with a prayer did not.[10] And, for good measure, what of the Decalogue? Well, that depended on whether the Commandments were etched into a massive granite monument on the grounds of a state capitol (constitutional) or were one part of a multifarious exhibit at two county courthouses (unconstitutional).[11]

During the exact same period in which *Smith* was jeopardizing the status quo of religious exercise, the Supreme Court provided mixed signals to lower courts and laymen alike on the matter of religious establishment. The Justices could not agree on the relevant political principles or legal standards motivating their decision-making: How much should we, as a nation, venerate strict separation between church and state? What about non-preferentialism between religious groups? Or religious accommodation? Did the First Amendment outline a constitutional duty to eradicate forms of religious coercion? Or did the Constitution only bar state endorsement of religion? And did the setting, audience, or history of a practice change the constitutional calculus? The Court vacillated, leaving the boundaries of religious rights uncertain.

Remarkably, this critical juncture did not transition quickly or easily into a clear, determinate, or path-dependent settlement within America's

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7. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

8. Cty. of Allegheny v. ACLU, 492 U.S. 573 (1989).

9. Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lee v. Weisman, 505 U.S. 577 (1992).

10. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Town of Greece, N.Y. v. Galloway, 134 S. Ct. 1811 (2014).

11. Van Orden v. Perry, 545 U.S. 677 (2005); McCreary Cty., Ky. v. ACLU of Ky., 545 U.S. 844 (2005).

church-state order. The *Smith* decision was met with resounding contempt, both in civil society and in the halls of government. A bipartisan Congress aimed to codify this constitutional backlash in the form of the Religious Freedom Restoration Act of 1993. The explicit purpose behind this statute was to return to the church-state order of the pre-*Smith* period. This was to be accomplished by reestablishing the *Sherbert* test as the operative standard for "all cases where free exercise of religion is substantially burdened."[12] Passed with an overwhelming degree of support in both houses of Congress and then signed into law by President Clinton, this national RFRA effectively swooped in to unsettle *Smith* and reassert the *Sherbert* test as the standard that "applies to all Federal law, and the implementation of that law, whether statutory or otherwise."[13]

However, the RFRA was not on the books for four years before the Supreme Court sharply limited the scope of the statute. In *City of Boerne v. Flores*, the Supreme Court ruled that the RFRA did not apply to state and local governments.[14] In response, dozens of states spearheaded efforts to apply the *Sherbert* test to the states, oftentimes through legislative proposals to implement their own state RFRAs.[15]

Throughout this order indeterminacy, one distinct legal consciousness has emerged, intent on entrenching a particular agenda and rights regime.[16] This legal consciousness is animated by a commitment to

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12. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).

13. 42 U.S.C. § 2000bb–3 (1993).

14. Cty. of Boerne v. Flores, 521 U.S. 507 (1997).

15. To date, at least 21 states have passed state RFRAs. *See*, National Conference of State Legislatures, *State Religious Freedom Restoration Acts* (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/6LZN-GUGG].

16. By legal consciousness, I mean to connote the phenomenological character of the law in relation to the legal subject, namely, the orientation one has both when imagining and experiencing the present legal system and examining future constructions of that system. As sociologists Patricia Ewick and Susan S. Silbey explain, legal consciousness concerns the "patterned, stabilized, and objectified" set of legal "meanings" that constitute and make sense of the law. PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE 39 (1998). According to Ewick and Silbey:

> In this theoretical framing of legal consciousness as participation in the construction of legality, consciousness is not an exclusively ideational, abstract, or decontextualized set of attitudes toward and about the law. Consciousness is not merely a state of mind. Legal consciousness is produced and revealed in what people *do* as well as what they *say*. In this sense, consciousness is . . . constituted and expressed in the practical knowledge individuals have of social life. Consciousness is discursively deployed as reflexive consideration about day-to-day activities; it is also tacitly enacted as competent social action.

Id. at 46; *see also* Paul Baumgardner, *Kennedy, Consciousness, and the Monostructural Account of the American Legal Order*, UNBOUND: HARV. J. OF THE LEGAL LEFT, Vol. X (2015); Erik D. Fritsvold, *Under the Law: Legal Consciousness and Radical Environmental Activism*, 34 L. & SOC. INQUIRY Issue 4 (Fall 2009).

a robust right to free exercise, which entails limited government interference in religious practices and heightened deference to the dictates of conscience and the prerogatives of religious institutions. Relatedly, this consciousness champions a less-than-robust Establishment Clause, in the name of maintaining the cultural importance of visible religion. According to this consciousness, religion—equipped with its language, symbols, and other material trappings—should be allowed a conspicuous and salutary presence in American life.

It would be fair to argue that this consciousness has united and driven a nebulous coalition of religious adherents, institutions, conservative interest groups, and activists. If this particular legal consciousness is not sufficiently institutionalized—which, at the very least, indicates translation into the laws, legal practices, and judicial standards surrounding religious free exercise and religious establishment—the coalition worries that religious adherents and institutions will be susceptible to extensive political harm. For this reason, the coalition has become an active presence in American law and politics. It has played an instrumental role in lobbying and litigation efforts surrounding the national and state RFRAs, and coalition forces also have been at the forefront of defending the public role of religion in American life.[17]

II. INTERCURRENCE

Since *Smith* was handed down in 1990, exposing and broadening a rift in the church-state order within this country, other key political orders within the United States have experienced separate (yet, as we will see, deeply connected) developments. One of the most significant order developments concerns the recognition and expansion of constitutional rights for members of the LGBTQ community.

Thirty-two years ago, the U.S. Supreme Court found Georgia's sodomy laws to be constitutionally valid.[18] Since that time, however, a legal consciousness related to the protection of LGBTQ rights has formed in the United States. This consciousness has stressed the manners in which virtues of fairness, equality, justice, toleration, and compassion demand a reconsideration of the rights afforded to members of the LGBTQ community. Numerous legal and political science scholars have detailed the changing public attitudes surrounding the LGBTQ community,

17. *See* ANDREW R. LEWIS, THE RIGHTS TURN IN CONSERVATIVE CHRISTIAN POLITICS: HOW ABORTION TRANSFORMED THE CULTURE WARS (2017).

18. Bowers v. Hardwick, 478 U.S. 186 (1986).

including the courthouse victories for the community. However, little attention has been paid to the legal consciousness behind these recent rights recognitions or to the manner in which this legal consciousness has interacted with and grated against other legal consciousnesses in the United States. During the exact same period in which (1) *Smith* and *Sherbert* redux were seesawing, (2) Free Exercise Clause and Establishment Clause interpretations were shifting, (3) RFRAs began to be debated at the national and state levels, and (4) the general state of the church-state order in America was up in the air, the progressive legal consciousness surrounding LGBTQ rights grew and started making landmark strides.

Lest all this talk of critical junctures, consciousnesses, and orders has come across as an unduly abstract presentation of contemporary American political developments, let's reground these radical evolutions. It is essential to keep in mind how both of these legal consciousnesses bubbling up from the 1990s to the present have been promulgated, developed, and enacted by diverse coalitions and support structures. In the same way that religious rights forces have mobilized in the wake of *Smith*, it has demanded an incredible amount of time, money, manpower, legal aid, and movement strength to take down state sodomy laws, unsettle the Defense of Marriage Act, advance the state and national cases for same-sex marriage, and craft anti-discrimination statutes through multiple institutional avenues.[19]

Some might argue that the most fascinating feature of these concurrent order developments relates to the radical contingency and inessential antagonism involved in the meeting of these opposing movement forces. These coalitions originally were motivated by legal consciousnesses not intrinsically in competition or even directly oriented towards the same universe of legal harms. However, it is important to note how these two different coalitions—each equipped with disparate support structures and united by discrete legal consciousnesses (which themselves were directed towards dissimilar rights regimes)—were in the process of reconstructing independent *yet historically proximate* orders.[20]

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19. NATHANIEL FRANK, AWAKENING: HOW GAYS AND LESBIANS BROUGHT MARRIAGE EQUALITY TO AMERICA (2017); JO BECKER, FORCING THE SPRING: INSIDE THE FIGHT FOR MARRIAGE EQUALITY (2014); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 L. & SOC. REV., 1 (2009); CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

20. Through a rich combination of (1) a motivating legal consciousness (linked to a particularly privileged rights regime), (2) coalitional strength, and (3) a support structure that enabled mobilization, these forces sought to reconstruct their respective political orders.

The dynamic workings of these two different coalitions have generated a state of intercurrence between the church-state order (which was the chief target of influence for the religious rights coalition) and the politico-sexual order (which was the chief target of influence for the LGBTQ coalition). In short, as these two coalitions have influenced their respective political orders over the past several decades, the developing church-state order and politico-sexual order have themselves exerted immense, contrasting pressure on one another.[21]

In their classic work of historical-institutionalist scholarship, *The Search for American Political Development*, political scientists Karen Orren and Stephen Skowronek describe the confrontational character of such intercurrence:

> Intercurrence depicts the organization of the polity seen strictly from a historical institutional point of view. It directs researchers to locate the historical construction of politics in the simultaneous operation of older and newer instruments of governance, in controls asserted through multiple orderings of authority whose coordination with one another cannot be assumed and whose outward reach and impingements, including on one another, are inherently problematic.[22]

The activities of the religious rights coalition and the LGBTQ coalition since 1990 have led to a dialectic between the American church-state order and the American politico-sexual order on various institutional fronts, and these orders continue to collide in the most acrimonious of ways, constructing—along the way—uncharted and unclear frontiers of legal harm and remedy.

Many of these dialectical encounters have been designed quite consciously. Into the early 2010s, although state RFRAs were getting passed (generally with bipartisan support), some of the most attention-grabbing efforts by the religious rights coalition to procure remedies for

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21. In *Institutions and Intercurrence: Theory Building In The Fullness Of Time*, Karen Orren And Stephen Skowronek outline how this phenomenon of intercurrence will include:

> Replacing the expectation of an ordered space bounded in synchronized time with the expectation of a politicized push and pull arrayed around multiple institutional arrangements with diverse historical origins. With this image of the political universe in view, attention is directed to the ways in which different ordering principles converge, collide, and fold onto one another.

Karen Orren & Stephen Skowronek, *Institutions and Intercurrence: Theory Building In The Fullness Of Time*, 38 NOMOS 138 (1996).

22. KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 113 (2004).

violations of statutory and constitutional religious rights included issues perceived as threatening to the LGBTQ coalition. When the Christian Legal Society tried to become a university-sanctioned student organization at the University of California, Hastings College of Law, it was rejected on the grounds that the Society was discriminatory towards LGBTQ students.[23] The Christian Legal Society sued the school, and by the time the case had wormed its way to the U.S. Supreme Court, both the religious rights coalition and the LGBTQ coalition had lined up to support their respective sides.

From the perspective of many active within or sympathetic to the LGBTQ coalition, it seems as if a large number of the purported advances in religious liberty have had the larger effect of safeguarding believers' freedom to discriminate against traditionally marginalized persons. Two years after *Christian Legal Society v. Martinez*, a unanimous Supreme Court ruled that the Free Exercise and Establishment Clauses protect religious institutions against employment discrimination lawsuits brought by their religious leaders and teachers (in this case, a disabled woman who occasionally taught religion courses at a Lutheran school).[24] In 2014, the high court interpreted the national RFRA with such breadth that Hobby Lobby Stores are not legally required to supply basic contraceptive services to thousands of its female employees.[25] A year later, a county clerk in Kentucky even relied on her religious beliefs to justify her refusal to sign marriage licenses for same-sex couples.[26] The clerk, Kim Davis, remarked: "To issue a marriage license which conflicts with God's definition of marriage, with my name affixed to the certificate, would violate my conscience . . . I have no animosity toward anyone and harbor no ill will. To me this has never been a gay or lesbian issue. It is about marriage and God's word."[27] A dominant worry within the evolving

23. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661 (2010). The Christian Legal Society's stated beliefs and mission were opposed to homosexuality and homosexual behavior, and the Society did not permit students who were living in opposition to the Society's tenets to be active members. *Id.*

24. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C., 565 U.S. 171 (2012).

25. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014); *see also* Zubik v. Burwell, 136 S. Ct. 1557 (2016).

26. Eugene Volokh, *When does your religion legally excuse you from doing part of your job?*, WASH. POST (Sept. 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/04/when-does-your-religion-legally-excuse-you-from-doing-part-of-your-job/?utm_term=.c3467b13b365 [https://perma.cc/3NUV-PFXZ].

27. Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), https://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html?_r=0 [http://perma.cc/43XC-CJGQ].

American politico-sexual order is that the religious rights coalition is only interested in finding suitable remedies for harms perpetrated against religious adherents and institutions; the coalition is not concerned with avoiding harm to women, the disabled, or members of the LGBTQ community.[28]

However, from the perspective of many active within or sympathetic to the religious rights coalition, the progressive legal consciousness surrounding LGBTQ rights has obtained a frightening degree of institutional recognition in the United States. Over the course of only 12 years, anti-sodomy laws were struck down as unconstitutional,[29] DOMA was eviscerated,[30] California's Proposition 8 was buried,[31] multiple states elected to recognize same-sex marriage, and the U.S. Supreme Court ruled that the U.S. Constitution guaranteed the right of marriage to all same-sex couples across the country.[32] A common view within the religious right coalition is that these recent constitutional gains for the LGBTQ community are ever expanding and even imperialistic, effectively crowding out space for religious observance (particularly for faith communities that do not condone LGBTQ rights, identities, behaviors, practices, etc.). Moreover, legal protections for the LGBTQ community actually are forcing religious adherents into actions that they are religiously opposed to performing.[33] As such, a dominant worry within the evolving American church-state order is that the LGBTQ coalition is only interested in finding suitable remedies for harms perpetrated against the LGBTQ community; the coalition is not concerned with avoiding harm to the rights, beliefs, and practices of religious adherents and institutions.

III. MOVING FORWARD?

Although it would be unnecessarily apocalyptic to claim that the intercurrence between these two political orders has reached a legal zero-sum point—where one order is demonstrably harmed by each gain enjoyed by the other order—the rhetoric surrounding present legal

28. *See, e.g.*, Ed O'Keefe, *Gay rights groups withdraw support of ENDA after Hobby Lobby decision*, WASH. POST (July 8, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm_term=.b746e0136790 [http://perma.cc/G54T-YJA9].

29. Lawrence v. Texas, 539 U.S. 558 (2003).

30. United States v. Windsor, 570 U.S. 744 (2013).

31. Hollingsworth v. Perry, 570 U.S. 693 (2013).

32. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

33. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

struggles for religious rights and LGBTQ rights certainly could lead a casual observer to this conclusion.

A clear example of this concerns the fate of RFRAs. Whereas the national RFRA and numerous state RFRA proposals received widespread support from both parties just a few years ago, more recent efforts to pass state laws protecting religious rights have generated marked partisan divisions and intense public scrutiny. When Indiana passed a common model RFRA in 2015, a groundswell of opposition developed from the LGBTQ coalition, as well as from corporations, celebrities, and everyday Americans. Boycotts and protests escalated until additional legislation assuaged critics. Later attempts to pass state RFRAs in Arkansas, Georgia, and North Carolina were equally contentious. Seen as offering legal cover for bigotry, hatred, and discrimination, RFRAs and similar protective legislation are now regularly talked about as anti-LGBTQ legislation and government permissions to victimize.[34] At least one state has gone so far as to take the fight to states with RFRAs. In 2016, California elected to ban state-supported travel to "states that California believes don't protect religious freedoms and states that it says use religious freedom as a basis of discrimination."[35]

IV. CONCLUSION

The best mechanism for resolving the intercurrence between the church-state order desired by the religious rights coalition and the politico-sexual order desired by the LGBTQ coalition is yet to be discovered. However, much hangs in the balance. If *Smith* showcased a critical juncture within the church-state order, the state of religious liberty appears just as blurry in the wake of religious liberty protection laws becoming unpopular and legally suspect. Similarly, the LGBTQ coalition has brought attention to the legal inconsistencies and uncertainties that continue to affect the LGBTQ community. This includes, but clearly is not limited to, the proper scope of federal and state anti-discrimination

34. *See, e.g.*, Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate but Equal*, 65 DEPAUL L. REV. 907 (2016); Lucien J. Dhooge, *The Impact of State Religious Freedom Restoration Acts: An Analysis of the Interpretive Case Law*, 52 WAKE FOREST L. REV. 585 (2017); Jennifer Finney Boylan, *The Masterpiece Cakeshop Case Is Not About Religious Freedom*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/opinion/gay-religious-freedom-cake.html [http://perma.cc/VC5Z-K5KD].

35. Carma Hassan, *California adds 4 states to travel ban for laws it says discriminate against LGBTQ community, CNN* (June 23, 2017), http://www.cnn.com/2017/06/23/us/california-travel-ban/index.html [https://perma.cc/C24Z-CE5N]; S. Con. Res. 1887, 2015 Gen. Assemb,, Reg. Sess. (Cal. 2016).

laws in the areas of housing, employment, adoption, public accommodations, and education.

It is possible that the church-state order and the politico-sexual order will naturally move out of intercurrence. The religious rights coalition might fade, morph, and/or become less influential within the church-state order. The same goes for the LGBTQ coalition as it relates to the politico-sexual order. But what if the intercurrence does not go the way of spontaneous, harmonious reordering. What if the different histories, agendas, logics, actors, rights regimes, and authority structures within these orders do not resolve themselves?

Should we then defer to the vicissitudes of a shifting federal judiciary? Do the top-down remedies flowing from Supreme Court and lower court decisions even possess the requisite reconciliatory powers for these orders? Another option would be to entrust the wheels of federalism with the elimination of any intercurrence harms, or at least to equally appreciate the competing orders. But do we want different state authorities—each endowed with unique, local political priorities—to be responsible for gradually shaping the legal compromises and relative powers of the church-state order and the politico-sexual order?

Most likely, the explosive intercurrence that we have witnessed between the church-state order and the politico-sexual order dominant in the United States is going to have to be directly untangled through a series of forceful, purposive legal measures. The law has been a substantial force in restructuring the American church-state order and the politico-sexual order since 1990 (and certainly well before that). The law should prove to be a substantial force in future construction as well. But what constructions will be made and how they will become path dependent are highly contingent, which seems to augur a continuation of mobilizations and confrontations from religious rights and LGBTQ coalitions, each angling to be the authors of the salvific legal measures.